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Summary record of the 902nd meeting

Held at Headquarters, New York, on Monday, 21 June 2010, at 3 p.m.

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) ..... (Switzerland)

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Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)

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The meeting was called to order at 3.15 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)
(A/CN.9/703 and Add.1; A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules

Section I. Introductory rules

Draft article 4. Response to the notice of arbitration (*continued*)

1. **Mr. Torterola** (Argentina) said that his delegation wished above all to avoid the risk that paragraph 2 (e) might be interpreted as in any way impeding a respondent's ability to make counterclaims or claims at a later stage, and was therefore proposing that that subparagraph begin with a phrase such as "As far as possible ...".

2. **The Chairperson** said that the components of the response to the notice of arbitration listed in paragraph 2 were in any event optional. The concerns of the representative of Argentina might be better met by making paragraph 1 (b) less prescriptive. That would have the merit of also addressing the concern, expressed at the 901st meeting, that the deadline of 30 days established in paragraph 1 might be too onerous for some parties and yet too lengthy for others. The wording proposed by the representative of Argentina matched that used in draft article 20, paragraph 4, which indicated that "The statement of claim should, as far as possible, be accompanied by all documents ...".

3. **Mr. Jacquet** (France) said that his delegation did not favour reflecting the wording of draft article 20 in draft article 4, paragraph 1 (b), because the two dealt with different situations and were not comparable. In the case of article 20, the situation was one of furnishing documentation, while in draft article 4, paragraph 1 (b), the situation involved a 30-day deadline for action. If the words "as far as possible" were applied to the deadline, it risked losing all significance.

4. **The Chairperson**, in connection with the requirements of paragraph 1 (b), said that the components of the response to the notice of arbitration fell into two distinct groups: those relating to the claims involved in the case, and those relating to the constitution of the arbitral tribunal. In practice, arbitral institutions tended to apply deadlines more strictly to some requirements associated with the response to a notice of arbitration than to others. He therefore wondered whether the representative of France wished strict deadlines to apply to responses to every component of the notice of arbitration described in draft article 3, paragraphs 3 (c) to (g).

5. **Mr. Jacquet** (France) said that, in his view, some discretion could be used in determining deadlines, depending on the nature of the information concerned.

6. **Mr. Chung** Chang-ho (Republic of Korea) said that he supported leaving the existing wording of paragraph 1 (b) unchanged. The purpose of the article as a whole was to clarify outstanding issues at an early stage in the arbitration process, so 30 days seemed to offer enough time to do so. Moreover, any respondent unable to respond to the notice of arbitration within those 30 days could indicate that fact in the statement of defence described in draft article 21.

7. **Mr. Moollan** (Mauritius), recalling the distinction between the compulsory and optional components of the notice of arbitration itself, covered in draft article 3, paragraphs 3 and 4, said that the very same distinction applied to draft article 4, paragraphs 1 and 2. As a result, making paragraph 1 (b) less prescriptive would have the effect of blurring that distinction. If he had understood it correctly, the concern of the Argentine delegation was that a respondent, in failing to provide the claimant with the information indicated in paragraph 2 (e) within the required 30 days, might lose any opportunity to do so at a later stage of the arbitration process. Perhaps that eventuality could be addressed by replacing "A response" in paragraph 1 (b) with "An indicative response".

8. **Mr. Ghikas** (Canada) said that the concerns of the representative of Argentina could probably be dispelled, as draft article 30, paragraph 1 (b), indicated that a failure by the respondent to communicate its response would not be treated by the arbitral tribunal as an admission by the respondent of the claimant's allegations.

9. **The Chairperson** said that, at the stage of the arbitral process to which draft article 4 applied, no arbitral tribunal would yet have been constituted. Moreover, the components of the response relating to the claims involved in the case were less urgently needed than those relating to the constitution of an

arbitral tribunal. A delay in supplying the latter would lead to a delay in starting the arbitral process.

10. **Mr. Castello** (United States of America) said that the representative of Argentina seemed to be focusing on the features of the draft revised UNCITRAL Arbitration Rules that were new relative to the 1976 Arbitration Rules, such as the requirement for a respondent to provide information relating to the merits of the case. He understood that the deadline for receipt of such information might be a problem, for example in the case of a State that was obliged to seek outside counsel via a time-consuming procurement procedure. By contrast, the requirement for a respondent to provide information on the constitution of the arbitral tribunal was not new, and was in fact subject to a more generous deadline than before: 30 days rather than the 15 days stipulated in article 5 of the 1976 version of the Rules.

11. **The Chairperson** said that he inferred from the current discussion that a respondent's failure to provide a response to the notice of arbitration in connection with the claims involved in the case was not considered as serious as appeared at first sight from reading draft article 4, paragraph 1 (b), alone, as that provision should be read in conjunction with draft article 30, paragraph 1 (b), which suggested that some considerable time was available to the respondent.

12. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that, in the context of international arbitration rules as a whole, notices of arbitration and the responses thereto were customarily very brief, in contrast to statements of claim and statements of defence, which were more complete. Accordingly, the 30-day deadline seemed appropriate. It was, furthermore, in line with usual international arbitration practice. It should be remembered that the deadline applied in the current case to the information listed in draft article 3, paragraphs 3 (c) to (g), which did not need to be detailed. That seemed to be confirmed by draft article 3, paragraph 3 (e), which referred to "a brief description of the claim".

13. **The Chairperson** said that, if the solution proposed by the representative of Mauritius was adopted, it could apply only to some of the components of the response listed in paragraph 1 (b), namely those relating to the components of the notice in draft article 3, paragraphs 3 (e) and (f). In view of the discussions that had just taken place, the first option was to leave draft article 4, paragraph 1 (b), unchanged, and the second option was to replace "A response" at the beginning of that subparagraph with "An indicative response", specifying also that that applied only to article 3, paragraphs 3 (e) and (f).

14. **Ms. Smyth** (Australia), supported by **Mr. Möller** (Observer for Finland), said that it was preferable for draft article 4, paragraph 1 (b), to be left unchanged.

15. **Mr. Boulet** (Observer for Belgium) said that adding the word "indicative" risked creating confusion as to what information was admissible and the degree to which it was binding. Moreover, draft article 4 already made a useful distinction between compulsory and optional information and should not have added to it a further category of information termed "indicative". He therefore also favoured leaving draft article 4, paragraph 1 (b), unchanged.

16. **Mr. Castello** (United States of America) said that his delegation also preferred draft article 4, paragraph 1 (b), to be left unchanged. However, if the Working Group and the Committee felt it necessary to communicate the non-binding nature of some of the information required of the respondent, he did not favour adding the word "indicative", which risked being misinterpreted. Perhaps a reference could be made to draft article 30 (1) (b) instead.

17. **Mr. Lebedev** (Russian Federation) said that he favoured leaving draft article 4, paragraph 1 (b), unchanged, as the concern raised by the representative of Argentina presented itself in only a few cases, and those cases could be resolved by a number of means.

18. **The Chairperson** said that the Committee seemed to agree that information provided by the respondents on claims involved in the case should not be considered binding at that stage of the arbitration process. He took it that the Committee wished to adopt draft article 4 unchanged and to reflect its discussions on the matter in the draft report of the Commission.

19. *Draft article 4 was adopted.*

Draft article 9

20. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage) pointed out that the text of paragraph 1 did not provide for the two arbitrators appointed by the parties to consult with the parties prior to choosing the president of the arbitral tribunal. Since it was the usual practice for the arbitrators to do so, it would be

preferable to specify that the choice should be made after consultation with the parties should the arbitrators so decide.

21. **Mr. Petrochilos** (Greece) said that he supported the amendment because it made it clear that consultation was not precluded and that both arbitrators could consult.

22. **Mr. Möller** (Observer for Finland) said that he preferred leaving the text as it stood because it already allowed for such consultation.

23. **Mr. Castello** (United States of America) said that the proposed amendment would have to make it clear whether both arbitrators could consult with both appointing parties or simply each arbitrator with the corresponding party, which was the usual practice. Since most other rules were unspecific on the matter, he himself doubted that the amendment was needed.

24. **Mr. Chung** Chang-ho (Republic of Korea) said that the established practice of consultation by the arbitrators with the parties might conceivably be seen to conflict with the need for their impartiality and independence under other provisions of the Rules. Perhaps that issue should be clarified by making an addition to draft article 11 confirming the acceptability of that practice.

25. **Mr. Castello** (United States of America) observed that, in many ethics guidelines, consultation with the party regarding the choice of a possible arbitrator was not considered problematic.

26. **Mr. Schöll** (Observer for Switzerland) pointed out that the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes, in Canon III.B.2, made it clear that, as the United States had suggested, each arbitrator could consult with his or her appointing party. He supported retaining article 9, paragraph 1, as drafted.

27. **Mr. Torterola** (Argentina) said that it was not necessary to legislate about exceptions to the rule. He believed the text as it stood left enough latitude for what was the accepted practice.

28. **The Chairperson** said that the consensus seemed to be to retain draft article 9, paragraph 1, as drafted, with the understanding that the report would indicate that the standard practice was uncontested and thus the Commission saw no need to make express provision for it. He drew attention to the comment by Slovenia (in document A/CN.9/704, p. 5) that both paragraphs of draft article 8 were relevant to draft article 9, paragraph 3, and not merely the second paragraph, as indicated in the current text. He therefore took it that the Committee wished to delete the words ", paragraph 2" at the end of article 9, paragraph 3, and thus refer to draft article 8 in its entirety.

29. *It was so decided.*

30. *Draft article 9, as amended, was adopted.*

Draft article 10

31. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage) said that the aim of paragraph 3 of article 10 was to safeguard the equality of the parties as to the appointment of arbitrators — in line with the 1992 judgement of the French Court of Cassation in the *Dutco v. BKMI and Siemens* case — by allowing the appointing authority, when constituting the arbitral tribunal, to revoke any appointment already made so as to appoint the entire tribunal. He suggested adding the clause ", while respecting the equality of the parties" at the end of paragraph 3, in order to emphasize the principle.

32. **The Chairperson** said that perhaps the requirement to respect the equality of the parties was self-evident.

33. **Mr. Petrochilos** (Greece), recalling the legislative history of paragraph 3, said that it had been intended to accommodate all legal systems in resolving situations such as the one that had given rise to the *Dutco* case. If the proposed wording was added, the provision might diverge from the International Chamber of Commerce (ICC) International Court of Arbitration Rules and the London Court of International Arbitration (LCIA) Rules, and create more problems than it solved.

34. **Mr. Montecino Giralt** (El Salvador) said that he supported the amendment proposed by the Comité Français because the text as it stood might make the parties unequal.

35. **Mr. Jacquet** (France) said that while it might seem tautological to refer explicitly to equality of the parties in a rule aimed at that principle, the proposed amendment would have the advantage of instructing the appointing authority to bear that principle in mind at all times.

36. **The Chairperson** suggested that it might be better to introduce such a reference to equality of the parties in draft article 6 in general terms rather than in draft article 10 in connection with one specific intervention by the appointing authority.

37. **Mr. Jacquet** (France) said he considered that an ingenious solution.

38. **Mr. Castello** (United States of America) said he agreed with Greece that the proposed additional wording would create more difficulties than it solved. It would be best to state in the report that the purpose of the provision was to achieve equality of the parties, and leave it at that.

39. **Mr. Boulet** (Observer for Belgium) said that he believed the text should be made more specific, perhaps simply by stating that the appointing authority might "if need be" revoke any appointment already made.

40. **Mr. Moollan** (Mauritius) said that he agreed with the United States that it would open a Pandora's box to refer to equality, either in draft article 10 or draft article 6. Article 10, paragraph 3, alleviated the *Dutco* problem by shifting the power of appointment from the parties to an institution, and the text should not in any way tie the hands of the appointing authority. In effect, the problem of the equality of the parties was resolved by removing the power of appointment from the parties.

41. **Mr. Ghikas** (Canada) concurred.

42. **The Chairperson** said that there seemed to be consensus that the appointing authority should be allowed to exercise discretion as to whether or not to revoke an appointment already made and should be given the same freedom that the parties had. The equality of the parties was of course the basic principle for the appointing authority, but it should not be specifically prescribed. The substance of the discussion on paragraph 3 could simply be set out in the report.

43. *Draft article 10 was adopted.*

Draft article 11. Disclosures by and challenge of arbitrators

44. **Mr. Abascal Zamora** (Mexico) said that any circumstances that might give rise to justifiable doubts as to the impartiality or independence of an arbitrator might be known by means other than notification by the arbitrator. His delegation therefore proposed that, in the final part of the draft article, the words "unless they have already been informed by him or her of these circumstances" should be replaced by "unless they have already been informed of these circumstances".

45. **Mr. Moollan** (Mauritius) wondered whether the point just made was not covered by draft article 12, paragraph 2.

46. **The Chairperson** said that Mexico's proposal went further in that it would allow an arbitrator to claim that the parties already had knowledge of the circumstances in question.

47. **Mr. Abascal Zamora** (Mexico) said that draft article 11 set an obligation of disclosure, whereas draft article 12 regulated challenges made to an arbitrator by a party.

48. **The Chairperson** wished to know whether the present wording of draft article 11, which was the same as that of article 9 of the 1976 version of the Rules, had given rise to any problems in practice.

49. **Mr. Moollan** (Mauritius) said that, as an arbitrator could not be expected to know what was known by the parties, that could not qualify his or her obligation of disclosure. As for challenges to an arbitrator, the stipulation in draft article 13, paragraph 1, that such challenges must be notified within 15 days would debar such challenges in the hypothesis of the circumstances being already known to the parties.

50. **The Chairperson** said that the restrictive nature of the present wording of draft article 11 did not appear to have any real consequences, since a party could not rely on what had been known all along in order to make a challenge.

51. **Mr. Torterola** (Argentina) agreed with the delegation of Mauritius that the obligation of disclosure should not be affected by what might already be known to the parties. Turning to the question of justifiable doubts, he said that the present wording was not clear as to whom such doubts might be considered justifiable. His delegation proposed that it should be specified that the doubts must be justifiable in the view of an impartial third party.

52. **The Chairperson** said that there appeared to be a consensus in favour of retaining the present wording.

53. *Draft article 11 was adopted.*

The meeting was suspended at 4.55 p.m. and resumed at 5.15 p.m.

Draft article 12

54. *Draft article 12 was adopted.*

Draft article 13

55. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage) said that the present wording of the draft article did not require reasons to be given for the decision taken by the appointing authority on a challenge to an arbitrator. Although some institutions, like the International Chamber of Commerce, did not give reasons for their decisions on such requests, in a context where the parties had not necessarily designated the appointing authority in advance, those parties might not wish to leave such decisions to the complete discretion of that authority. The Comité Français de l'Arbitrage therefore proposed that the wording of the final sentence of draft article 13, paragraph 4, should be changed accordingly, with, in addition, the introduction of a reasonable time limit, so that it would read: "In that case, within 30 days from the date of the notice of the challenge, it shall seek a reasoned decision on the challenge by the appointing authority within a reasonable time".

56. **Mr. Moollan** (Mauritius) said that there had been much debate on the desirability of reasons being given for such decisions by the appointing authority. The present forum was not the most appropriate place to decide the matter. The International Chamber of Commerce had chosen not to give the reasons for its decisions on such requests; some years previously, the London Court of International Arbitration had decided to do so, but in fact it still did not publish such reasons because of the problems that might ensue.

57. **Mr. Seweha** (Egypt) said that doubts as to the impartiality of an arbitrator should not be based on hearsay. It would not be sufficient to be given reasons for a challenge; supporting evidence should also be required, as in draft article 20, paragraph 4. His delegation therefore proposed the addition at the end of the second sentence of paragraph 2 of words to the following effect: "[... reasons for the challenge], and, as far as possible, provide the documents and other evidence relied upon by the challenger."

58. **Mr. Montecino Giralt** (El Salvador) suggested that, for the sake of clarity, it would be useful to include an obligation to give reasons for a challenge in paragraph 1 and not paragraph 2 of the draft article. That would solve the problem of whether the period of time should be calculated from the time of receipt of the notice of the challenge or of the making of the challenge.

59. **The Chairperson** recalled that Slovenia had pointed to the inconsistency between the method of calculating a period of time prescribed in draft article 2, paragraph 5, where the starting date was the date of receipt of a notice, and the 15-day rule set out in draft article 13, paragraph 4, where the starting date was the date of the notice. Since that difference did not appear to create a problem that needed to be resolved in draft article 13 and as, moreover, there was no support for any of the proposed amendments, he took it that the present wording of that draft article should stand.

60. *Draft article 13 was adopted.*

Draft article 14. Replacement of an arbitrator

61. *Draft article 14 was adopted.*

Draft article 15. Repetition of hearings in the event of the replacement of an arbitrator

62. *Draft article 15 was adopted.*

Draft article 16. Exclusion of liability

63. **The Chairperson** recalled that, in its comments regarding draft article 16 (A/CN.9/704), the Permanent Court of Arbitration (PCA) had indicated that it enjoyed legal immunity under various international instruments. It had further indicated that such immunity provided sufficient protection against liability, and that a specific waiver under the revised Arbitration Rules was therefore unnecessary in respect of the Court. He took it that, unless there were objections, the Committee wished to comply with the Court's request and remove the phrase "the Secretary-General of the PCA" from the draft article.

64. **Ms. Cordero Moss** (Norway) said that the proviso "save for intentional wrongdoing" might create the impression that the Arbitration Rules created a liability for intentional wrongdoing, even if there was no such liability under the applicable law. Since the existence of liability was regulated by the applicable law, the Rules could not regulate the existence of

liability; they could only allocate its financial consequences between the parties.

65. To avoid creating such an impression, her delegation proposed that the beginning of draft article 16 should be amended to read: "The parties waive, to the extent permitted under the applicable law, any claim that they may have under that law against the arbitrators ...".

66. **The Chairperson** observed that the language proposed by the representative of Norway would eliminate the words "intentional wrongdoing", thereby addressing the concerns raised in the comments that had been submitted by El Salvador (A/CN.9/704/Add.1) concerning the connotation of those words.

67. **Mr. Abascal Zamora** (Mexico), recalling that the concept of intentional wrongdoing was difficult to define in civil law systems, said his delegation shared the concerns that had been raised by El Salvador and supported the amendment proposed by the representative of Norway.

68. **Mr. Petrochilos** (Greece) said that he supported the proposed amendment. Recalling that arbitral decisions could not be appealed against on grounds of merit, he said that the Working Group had endeavoured to exclude liability to the extent possible in order to avoid the possibility of collateral challenges and attacks against arbitrators.

69. **Mr. Seweha** (Egypt) said that his delegation did not understand the reasoning behind the proposed amendment. He wondered why arbitrators should be granted rights not enjoyed by other professions. For example, judges were not exempt from liability and could be prosecuted for committing errors and forced to pay compensation. Arbitrators did not require such absolute protection, which could be abused. Questions of liability were best addressed under the relevant laws of each country. In fact, the laws of some countries, such as Egypt, did not provide for advance exemption from liability and considered such arrangements to be contrary to public order.

70. **Mr. Boulet** (Observer for Belgium) said that he supported the position of the representative of Egypt in connection with Norway's proposal. However, if the intention of that proposal was simply to emphasize that the Arbitration Rules may not regulate the existence of liability, then it would be preferable to delete the entire article. The key question was whether the Rules should in any way allow parties to waive claims against the arbitrators, even in cases of intentional wrongdoing, if the applicable law provided for such a waiver. The Working Group had decided that there must be a minimum ethical standard and parties should therefore not be allowed to make such waivers.

71. **Mr. Jacquet** (France) said that the draft article did not contain sufficient qualifications in respect of the waiving of claims against arbitrators: it was too indiscriminate. Under the present wording, the waiver targeted any and all action taken by the arbitrators, as well as individuals other than arbitrators, and yet simultaneously curtailed considerably the opportunity for a waiver by referring to applicable law. It would be preferable to use clearer and more categorical language, such as "no legal claim may be pursued against arbitrators on the basis of any aspect of an arbitral decision".

72. **Mr. Castello** (United States of America) said that the language of the article should focus on the question of the waiver. It was his understanding that the proposal of the representative of Norway was aimed at dispelling any implication that the article was creating liability. He wondered, however, whether it was desirable to remove the phrase "save for intentional wrongdoing", which the Working Group had arrived at after much debate. The point on which he sought clarification was whether, in those countries in which arbitrators could be held accountable for intentional wrongdoing, parties would be waiving their right to hold arbitrators accountable for intentional wrongdoing simply by adopting the Arbitration Rules. The wording proposed by the representative of Norway did not address that situation.

73. **Ms. Cordero Moss** (Norway) said that, unfortunately, there was no simple answer to the question raised by the representative of the United States of America because the draft article was not clear as to what constituted intentional wrongdoing. Therefore, in certain jurisdictions, there could be circumstances under which liability would somehow overlap with certain aspects of intentional wrongdoing. The Arbitration Rules would be establishing liability for certain acts, such as intentional wrongdoing, on the assumption that there was a universal understanding of what constituted intentional wrongdoing. However, legal systems had divergent positions as to which forms of liability were mandatory and which forms could be waived, the extent to which they could be

waived and in which circumstances. The laws of each State would therefore dictate whether liability could be waived.

74. **Mr. Castello** (United States of America) said that, based on the representative of Norway's reply, it seemed that the parties could, in certain circumstances, waive the right to make a claim on the basis of intentional wrongdoing. While it was true that the extent to which parties could waive liability varied from one jurisdiction to another, it was his understanding that the representative of Norway was implying that, because intentionality was viewed differently in various jurisdictions, it would make the scope of any waiver uncertain. However, after a long discussion, the Working Group had concluded that intentionality was a legal concept that was recognized under most legal systems. His delegation was therefore reluctant to delete the reference to intentional wrongdoing simply because no better solution was available.

The meeting rose at 6 p.m.